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From: LAW OFFICES OF CHRISTOPHER J. NEARY
Client/Matter: Millview CWD v. SWRCB
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COMMENTS:

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April 29, 2009

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James W. Kassel
Assistant Deputy Director for Water Rights
State Water Resources Control Board
P.O. Box 2000
1001 I St., 14th Floor
Sacramento, CA 95814

Re: 363:JO:262.0 (23-03-06)
Request for Hearing on Draft Cease and Desist Order

Dear Mr. Kassel:

On behalf of Millview County Water District ("Millview") request is made for a hearing on the Draft Notice of Cease and Desist Order ("CDO") associated with this matter. Millview is the Licensee of Mssrs. Thomas P. Hill and Steven Gomes ("Hill and Gomes") and specifically join in their Request for Hearing in this matter on all the grounds stated therein.

Millview further incorporates the Administrative Record and all the papers and records in that certain action entitled *Millview County Water District, et al. v. California State Water Resources Control Board*, Mendocino County Superior Court, Case No. 08-51450 and Case No. 08-51448, the entirety of which is in the possession of the State Water Resources Control Board by reason of its being a party to such action.

The fatal flaw in the Draft CDO is that its asserted statutory basis -- that there is a threat of unauthorized diversion of water if Millview diverts an annual amount in excess of 15 acre feet under this right -- is grounded entirely upon a "Preliminary Report" dated June 1, 2007 prepared by your staff in response to a complaint filed by a Mendocino County resident. This reliance is misplaced because: (1) the Division of Water Rights never finalized its "Preliminary Report;" (2) Millview and Mssrs. Hill and Gomes were never extended an opportunity for a hearing on such report; and (3) most importantly, the Division did not have the authority to impose a forfeiture of the right, or any portion thereof.

Millview, along with its Licensors, challenged the Preliminary Report by Writ of Mandate which proceeding is now pending before the Superior Court of California, County of Mendocino, under Case No. 08-51448. On January 14, 2009, Judge Schafer issued an Order stating that the "Preliminary Report" was "simply an opinion of a staff member and not a Board Decision." Although the report received the imprimatur of the Chief of the Division of Water Rights, the Court found that such reliance upon the "Preliminary Report" constituted an "Abuse of Discretion." The Court also noted that the SWRCB should "disavow the conclusion of forfeiture," or "pursue a due process course to reveal reviewable finality."

This Draft CDO is the Division's response to Judge Schafer's requirement that Millview and its Licensors be afforded due process. Millview appreciates the long denied opportunity for the premise and jurisdiction of the Division's Preliminary Report to be resolved.

The Draft CDO is legally incorrect because: (1) as a procedural matter it relies upon the "Preliminary Report" as a final forfeiture decision although it was never finalized in a manner comporting with due process; (2) substantively, neither the Division of Water Rights, nor the SWRCB has jurisdiction to impose a forfeiture of a pre-1914 appropriation; and (3) as a matter of law, and specifically under the standards set forth in *North Kern Water Storage District v Kern Delta Water District* (2007) 147 Cal.App.4th 555, even if the SWRCB has jurisdiction to act in this manner and to adopt the Draft CDO, the standard utilized in the Preliminary Report and the Draft CDO is erroneous, and reliance thereon an abuse of discretion.

Without conceding that the Board has any jurisdiction to issue the Draft CDO, there are several glaring factual errors therein bearing upon the issue of jurisdiction, including, but not limited to:

- In paragraph 11, the Draft CDO alleges that Millview does not possess documentation as to the position taken by Robert Wood, the predecessor in interest to Hill and Gomes. This is apparently a reference to off-record allegations made by the Complainant that Mr. Wood had disparaged the validity of the right, based upon oral statements made by Mr. Wood. The undersigned provided to the Division of Water Rights an "Assignment of Water Rights" executed by Mr. Wood on January 7, 1998 by which he specifically assigned the subject water rights to Millview's Licensors. Therefore, while Millview provided written documentation of Mr. Wood's affirmation of the right's validity, the Division has instead chosen to rely upon purported oral statements made by Mr. Wood who is now deceased and unavailable to disavow them.
- Paragraph 14 incorrectly asserts that the "Complaint was closed via a letter dated April 17, 2008." Judge Schafer has already ruled that the subject letter did not close the Complaint characterizing the letter as an "abuse of discretion."

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The Draft CDO is a most unwelcome initiative being addressed to Millview County Water District as it struggles to provide its citizens with water in the third year of a drought and water emergency. This is particularly so because:

- The SWRCB in Paragraph 10 of Decision D-1110 denied Millview's 1962 application for water rights with the erroneous assurance that the "Mendocino District is willing to sell water . . . [to] allow them to firm up their water supply . . ."
- The Division by letter dated August 30, 2007 ordered Millview County Water District to cease using water under its pending License 492 (Application 3601) and Permit 13936 (Application 17587) leaving Millview with little choice but to resort to use of the right now challenged by the Division.

Therefore, Millview advises that given the fifty percent (50%) cutback ordered by the Mendocino District, the effect of the Division's August 30, 2007 Order, and the proposed Cease and Desist Order, the impact would be to require Millview domestic use customers to cut back usage by over eighty percent (80%). Such a reduction which would endanger the public health and safety and is unprecedented.

Given this situation, Millview requests an early hearing on the proposed CDO and early reviewable decision by the SWRCB. In the absence of being provided authority to the contrary, Millview advises that it will continue diverting under its License with Messrs. Hill and Gomes pending decision of reviewable finality and any subsequent judicial review.

It should be noted for the record that the proposed action is not only legally flawed, it is also flawed as a matter of sound public policy as will be established at the hearing.

For all of the foregoing reasons, including those incorporated by reference, and for such reasons as will be advanced at the hearing, Millview asserts that the Draft CDO should not issue by the SWRCB.

Yours very truly,

/s/ CHRISTOPHER J. NEARY

CHRISTOPHER J. NEARY

CJN:jen

James W. Kassel

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cc: Millview County Water District Board of Directors

Mr. Timothy Bradley

Mr. Thomas Hill

Mr. Steven Gomes

Jared Carter, Esq.

Interested parties in *Millview CWD, et al. v. SWRCB*,

Mendocino County Superior Court Case No. 08-51450

and *Millview CWD, et al. v. SWRCB*

Mendocino County Superior Court Case No. 08-51448